Supreme Court, U.S.
FILED
APR 19 2002
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No. 01-1200

In the Supreme Court of the United States

SOUTHERN COMPANY, ET AL.,

Petitioners,

v.

RICHARD T. ALDERSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Illinois Court of Appeals, First District

BRIEF OF DAIMLERCHRYSLER AKTIENGESELLSCHAFT AS *AMICUS CURIAE* SUPPORTING PETITIONER AND SUGGESTING THAT THE PETITION BE HELD FOR, OR GRANTED TOGETHER WITH, THE PETITION IN NO. 01-929

JUSTS N. KARLSONS
DAVID M. RICE
MATTHEW J. KEMNER
Carroll, Burdick & McDonough LLP
44 Montgomery Street
Suite 400
San Francisco, CA 94104
(415) 989-5900

ALAN E. UNTEREINER*
ROY T. ENGLERT, JR.
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

**Counsel of Record*

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BRIEF OF DAIMLERCHRYSLER AKTIENGESELLSCHAFT AS *AMICUS CURIAE* SUPPORTING PETITIONER AND SUGGESTING THAT THE PETITION BE HELD FOR, OR GRANTED TOGETHER WITH, THE PETITION IN NO. 01-929

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus DaimlerChrysler Aktiengesellschaft ("DaimlerChrysler AG") is the petitioner in *DaimlerChrysler AG* v. *Olson*, No. 01-929 (petition for certiorari filed Dec. 19, 2001). That case, like this one, raises an important question concerning the limits imposed by the Due Process Clause of the Fourteenth Amendment on the power of state courts to exercise "general" *in personam* jurisdiction over a nonresident corporate defendant. The petitioners in this case have filed an *amicus* brief in No. 01-929 urging the Court to hold No. 01-929 and consider it together with this case. Apparently agreeing that the two cases should be considered together, this Court has taken No. 01-929 off of the April 19, 2002, conference for which it was scheduled. Petitioners also contend in their *amicus* brief in No. 01-929 that this case is a better vehicle for clarifying the due process limits on general jurisdiction. DaimlerChrysler AG files this brief to explain its contrary view.

DaimlerChrysler AG has a substantial interest in ensuring that, if this Court concludes that review is warranted in only one of these two cases, review is granted in No. 01-929 rather than in this case. The reason is straightforward: the Texas Court of Appeals in No. 01-929 relied on several different considerations in upholding the assertion of general jurisdiction. In this case, according to petitioners, the Illinois Court of Appeals in contrast

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[1] Pursuant to Rule 37.6, DaimlerChrysler AG states that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than *amicus curiae* and its counsel, has made a monetary contribution to the preparation or submission of this brief.

relied on a much simpler analysis implicating only one of the considerations deemed important by the Texas Court of Appeals. Accordingly, there is no guarantee, if this Court were to grant this case and hold No. 01-929 (rather than vice versa), that the Texas Court of Appeals would reach a different result following a reversal and remand in this case. The Texas Court of Appeals, after all, went out of its way to scour the record for materials never even cited by the respondents in No. 01-929, and to rely on arguments respondents never made below, in order to reach the result desired by that court. Any court that would go to such lengths to reach a particular result is unlikely, we submit, to change its mind when one of multiple grounds for its decision is disallowed.

Moreover, even beyond this case, DaimlerChrysler AG has a substantial interest in ensuring that this Court reach, and resolve, several subsidiary issues that are raised in No. 01-929 but absent from this case. For example, the Texas Court of Appeals relied, in part, on the maintenance of a passive website that provided basic information about the company and its products, and allowed users anywhere in the world to send and receive email communications, but was not in any way specifically directed toward Texas consumers or used to transact sales of products to Texas residents. It also relied on Daimler-Benz AG's efforts to vindicate its federally protected trademark rights in federal court. And the Texas Court of Appeals completely disregarded the separate corporate existence of an indirect U.S. subsidiary (even though the parties stipulated that the entities were separately operated). Each of these holdings will threaten DaimlerChrysler AG – and scores of other non-U.S. corporations – with adverse effects if left uncorrected by this Court. For precisely that reason, three national and international organizations representing the business community have asked this Court to grant review in No. 01-929 to resolve issues that are *not* raised in this case. See No. 01-929 Brief *Amici Curiae* of the Chamber of Commerce of the United States, the Organization for International Investment, and the National Associa-

tion of Manufacturers in Support of Petitioner, at 3, 5-12. This Court should grant that request.[2]

ARGUMENT

1. DaimlerChrysler AG wholeheartedly agrees with petitioners that "the permissible scope of general jurisdiction" under the Due Process Clause is a "recurring and important" question "on which this Court's guidance is unquestionably needed." Pet. 5; see also *id.* at 15-16 & n.10; Petition for a Writ of Certiorari, *DaimlerChrysler AG* v. *Olson*, No. 01-929, at 9-12 & n.3 (filed Dec. 19, 2001) ("No. 01-929 Pet."). Equally unassailable is petitioners' submission and showing (Pet. 15-24) that the state and federal courts are deeply divided over how to define the due process limits on general jurisdiction. See also No. 01-929 Pet. 12-24. The Court should grant review in at least one case raising a general jurisdiction issue to resolve the conflict in the lower courts and provide much-needed guidance in this important area of law.

DaimlerChrysler AG also agrees that the "[v]ague and expansive conceptions of general jurisdiction" employed by some lower courts "have produced highly damaging consequences." Pet. 24; see also *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980) (rejecting mode of jurisdictional analysis that would seriously undermine the "degree of predictability to the legal system" that is necessary to "allow[] potential defendants to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit") (internal quotations omitted). Moreover, in cases (such as *DaimlerChrysler AG* v. *Olson*) involving *non-U.S.* corporations forced to submit to the general jurisdiction of a U.S. State, the adverse consequences may include harm to "the Federal interest in Government's foreign relations policies." *Asahi Metal Industry Co.* v. *Superior Court*

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[2] We have filed with the Clerk letters from counsel to the parties consenting to the filing of this brief.

of California, 480 U.S. 102, 115 (1987). See also No. 01-929 Pet. 22-24; cf. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 425 n.3 (1984) (Brennan, J., dissenting) (noting Solicitor General's concern that broad interpretation of general jurisdiction would cause foreign companies to refrain from making purchases in the United States).[3]

DaimlerChrysler AG also agrees with petitioners that the decision below is egregiously wrong. Here, as in *DaimlerChrysler AG* v. *Olson*, an intermediate state appellate court has upheld the assertion of general *in personam* jurisdiction over a nonresident corporation that lacked all of the traditional indicia of "presence" within the forum State. See Pet. 12; see also No. 01-929 Pet. 3, 4, 6, 8. Petitioners' "contacts" with Illinois do not even remotely approach the kind of "continuous and systematic" activities within the forum that are required before general jurisdiction may be asserted consistent with the Due Process Clause. See No. 01-929 Pet. 5-6, 25-28.

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[3] In *Chase Manhattan Bank* v. *Traffic Stream (BVI) Infrastructure Ltd.*, No. 01-651 (cert. granted Jan. 4, 2002; argued April 17, 2002), the Solicitor General filed an *amicus* brief urging this Court to grant review in order to decide whether the alienage diversity statute, 28 U.S.C. § 1332(a)(2), which confers jurisdiction on the federal courts over disputes between U.S. citizens and "citizens or subjects of a foreign state," covers suits brought by corporations that are organized under the laws of a United Kingdom overseas territory. That issue, the federal government explained, has "significant foreign policy ramifications" and may influence whether "foreign nations * * * afford United States citizens reciprocal" treatment in "foreign courts." No. 01-651 U.S. Br. 2 (petition stage). The same is true in cases such as *DaimlerChrysler AG* v. *Olson*. In fact, the potential harm to foreign policy interests may be even greater in the latter context, at least where (as in *DaimlerChrysler AG* v. *Olson*) a state court in upholding jurisdiction gives short shrift to the competing policy interests of a foreign nation. See No. 01-929 Pet. 24; see also No. 01-929 Brief *Amici Curiae* of the Chamber of Commerce of the United States, the Organization for International Investment, and the National Association of Manufacturers in Support of Petitioner, at 10 ("International 'reciprocity' also poses risks to U.S. businesses, as courts of other countries could well follow the Texas example and begin to subject U.S. companies to suits in foreign jurisdictions on the thinnest of grounds.").

2. *Amicus* disagrees, however, with petitioners' argument – advanced in an *amicus* brief they filed in *DaimlerChrysler AG* v. *Olson*, No. 01-929 – that this case is a superior vehicle to No. 01-929 for clarifying the due process limits on general jurisdiction and that the Court therefore should grant review in this case while holding No. 01-929 pending the disposition here.

a. According to petitioners, the Illinois Court of Appeals' decision they ask this Court to review is unusual in that "courts that assert general jurisdiction typically do so by concatenating a large number of contacts and concluding that in combination they are sufficient to establish general jurisdiction." Pet. 5. Here, petitioners say, the lower court upheld the assertion of general jurisdiction "for one reason alone: because the bulk of the output of the plant [located on the Illinois-Indiana border] where the accident occurred was sold – in Indiana – to an Illinois firm." *Ibid.*

Accepting petitioners' interpretation of the decision below, the simplicity of the lower court's rationale makes this case a *less* desirable vehicle for resolving the widespread doctrinal confusion in the area of general jurisdiction. A decision to *reverse* in this case would do little more than disallow an extreme example of jurisdictional overreaching by the state courts. Although a decision to *affirm* in this case would have a far-reaching effect (by effectively removing all meaningful constitutional limits on the exercise of general jurisdiction), that outcome is highly unlikely. By contrast, a decision to *reverse* in No. 01-929 – which the petitioners here have said is the correct outcome – would go far toward clarifying the law of general jurisdiction by demonstrating that even the combination of factors invoked by the Texas Court of Appeals is an insufficient basis for general jurisdiction.

Nor is this all. Even a decision to *affirm* in No. 01-929 would offer valuable opportunities, missing from this case, to clarify the law of personal jurisdiction. For example, *DaimlerChrysler AG* v. *Olson* raises the issue of how courts should evaluate Internet "contacts" as part of the "minimum contacts"

inquiry. See No. 01-929 Pet. 15-17. That extremely important and timely issue, on which the lower courts are sharply divided, could not be resolved if the Court follows the petitioners' advice and grants review in this case while holding No. 01-929. The same is true of the important threshold issue of what standard should apply to imputing the "contacts" of one corporation to its corporate affiliate. As we have explained (No. 01-929 Pet. 18-22), some lower courts have applied the strict federal common law standard articulated in *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925), in conducting this federal due process inquiry; other courts have employed state-law "alter ego" principles in deciding whether to pierce the corporate veil; and the Texas Court of Appeals applied yet a third approach to the issue of attribution. See also *United States* v. *Bestfoods*, 524 U.S. 51, 63 n.9 (1998) (taking note of, but declining to resolve because the issue was "not presented in this case," the "significant disagreement among courts and commentators over whether, in enforcing CERCLA's indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing").[4]

With respect to these and other threshold legal questions raised in No. 01-929 but not in this case, the Court ordinarily would resolve them before proceeding to weigh *all* of the relevant "contacts" together to decide whether the constitutional threshold is reached. Petitioners' argument overlooks this first step in the analysis as well as the opportunities it offers to resolve pervasive, purely legal conflicts in the lower courts.[5]

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[4] To be sure, this case also presents an important threshold question of doctrine on which the lower courts are sharply divided: whether the "stream of commerce" theory may be used as a basis for asserting *general* jurisdiction (or is instead limited to specific jurisdiction cases). See Pet. 23. But that issue is *also* squarely presented in *DaimlerChrysler AG* v. *Olson*. See No. 01-929 Pet. 6, 12-14.

[5] Petitioners say that "[m]ulti-factor cases * * * are seldom well suited for this Court's review" (Pet. 5), but, of course, virtually *all* of this Court's specific and general jurisdiction cases have involved multiple contacts

This Court should not pass up the valuable opportunity to resolve at least some of the threshold doctrinal conflicts in No. 01-929 by granting this case instead.[6]

Finally, petitioners' argument proceeds on the flawed assumption that DaimlerChrysler AG's principal argument in No. 01-929 is that the Texas Court of Appeals gave undue weight, in the aggregate, to the various considerations it relied on in upholding general jurisdiction. In fact, *amicus*'s primary argument is that most if not all of the *individual* factors cited by the Texas Court of Appeals – maintenance of a passive website not specifically directed towards Texas consumers; enforcement of federal trademark rights by filing a federal lawsuit; and owning a separately operated indirect subsidiary – are *legally irrelevant* to the general jurisdiction calculus.

b. Petitioners also suggest that this case is a better vehicle because it involves U.S. rather than foreign corporations. See Pet. 16. We respectfully submit that the difference cuts in the opposite direction. Whatever their relevance to the legal analysis, the foreign policy implications of allowing the decision in No. 01-929 to stand surely make it a more, not less, urgent candidate for this Court's review. See note 3, *supra*.

Analytically, moreover, this difference is relevant not to the "minimum contacts" analysis but rather to the logically sub-

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between the defendant and the forum. Indeed, that would seem to be a natural consequence of the "minimum contacts" test itself (and of the multiple-factor tests traditionally employed for evaluating "fair play and substantial justice").

[6] At the end of the day, the petitioners here appear to believe that No. 01-929 involves *too many* certworthy issues to warrant the Court's review. But, of course, this Court retains discretion *not* to reach and resolve every subissue raised in a particular case (although DaimlerChrysler AG would certainly urge the Court to reach enough issues to allow definitive rejection of Texas's assertion of jurisdiction). That possibility, and the attendant flexibility it brings, make No. 01-929 an especially attractive candidate for this Court's review.

sequent issue of "fair play and substantial justice." See No. 01-929 Pet. 22-24. Petitioners do not explain why the determination whether a nonresident corporation has engaged in "continuous and systematic" activities inside of Illinois might hinge in some fashion on whether the company is incorporated in Georgia or Mexico.[7]

3. DaimlerChrysler AG also wishes to bring this Court's attention to the pending petition for certiorari in *McInnis* v. *Daniel*, No. 01-1290 (filed Mar. 4, 2002) ("No. 01-1290 Pet."). That case, like both this one and *DaimlerChrysler AG* v. *Olson*, raises a certworthy issue. That case, *unlike* this one but like *DaimlerChrysler AG* v. *Olson*, raises a question – on which this Court has already once granted review – concerning the due process limits on state-court assertions of "specific" jurisdiction. See No. 01-1290 Pet. 2-3, 9-18; No. 01-929 Pet. 28-30. Specifically, both *McInnis* and *DaimlerChrysler AG* v. *Olson* raise the question of when a claim "arises out of, or relates to," the defendant's forum contacts. Thus, if the Court were to grant review in *DaimlerChrysler AG* v. *Olson*, it could address important and recurring issues of *both* general and specific jurisdiction in a single case. If it instead grants this case and holds No. 01-929, the Court will need to grant review as well in *McInnis* v. *Daniel* if it wishes to resolve the pervasive conflicts in the lower courts over the meaning of the "relatedness" prong.

4. Finally, DaimlerChrysler AG believes that this Court should give serious consideration to granting *all three* of these cases, if it decides not to grant review in *DaimlerChrysler AG*

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[7] We note, moreover, that petitioners are wrong to suggest that No. 01-929 does not involve any U.S. corporation. In *DaimlerChrysler AG* v. *Olson*, the Texas Court of Appeals attributed various activities of MBNA, an indirect U.S. subsidiary, to the German parent company. MBNA is incorporated in Delaware and has its principal place of business in New Jersey. The activities of MBNA that were attributed to Daimler-Benz AG included MBNA's sales of Mercedes-Benz vehicles to dealers in Texas. Those sales by a corporation "foreign" to the State exercising jurisdiction are no different from the energy sales involved in this case.

v. *Olson* alone. This Court has sometimes granted more than one case raising related issues when there is a substantial need for clarification in an area of law.[8] That is plainly true of the whole area of personal jurisdiction law and the "minimum contacts" test, which the Court has left to develop in the lower courts without guidance for the past decade.

Because all three of these cases present variations in the issues they raise and/or the facts they present, the Court should give serious consideration to granting review in all three. For example, the Alabama courts in *McInnis* relied in part on a novel "reprehensibility" exception not involved in this case or in *DaimlerChrysler AG* v. *Olson*. See No. 01-1290 Pet. 24-26. That supposed exception blurs the line between the distinct "minimum contacts" and "fair play and substantial justice" inquiries (see Reply Brief for Petitioners, *McInnis* v. *Daniel*, No. 01-1290, at 9-10 (filed April 16, 2002) ("No. 01-1290 Reply Br.")), just as the Texas Court of Appeals' decision, by relying on the "stream of commerce" theory, disregards the line between general and specific jurisdiction. See No. 01-929 Pet. 2, 12-14. And while *McInnis* (like No. 01-929) involves an attribution question, it is the attribution of a corporation's contacts to individual officers and shareholders of the corporation – not the attribution of one corporation's contacts to an

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[8] For next Term, the Court already has ordered argument in tandem of *Lockyer* v. *Andrade*, No. 01-1127, and *Ewing* v. *California*, No. 01-6978, both addressing a single State's "three strikes" law. In the current Term, the Court has granted certiorari to address various aspects of the *Apprendi* problem in *Ring* v. *Arizona*, No. 01-488, *United States* v. *Cotton*, No. 01-687, and *Harris* v. *United States*, No. 00-10666; and has granted certiorari to address various aspects of the interrelation of state sovereign immunity doctrine and the Telecommunications Act of 1996 in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, and *Verizon Maryland Inc.* v. *Public Service Commission*, No. 00-1531 and consolidated case. Examples from earlier Terms abound. *E.g.*, *Calcano-Martinez* v. *INS*, 533 U.S. 348 (2001), and *INS* v. *St. Cyr*, 533 U.S. 289 (2001); *Albertson's Inc.* v. *Kirkingburg*, 527 U.S. 555 (1999), *Murphy* v. *United Parcel Service, Inc.*, 527 U.S. 516 (1999), and *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999).

affiliated company. See No. 01-1290 Pet. 18-24 (describing conflict in lower courts on former issue); No. 01-1290 Reply Br. 8 ("piercing of the corporate veil * * * is not at issue in this case"). Because of these variations, the Court may well benefit from considering all three of the cases together.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, reply brief, and U.S. Chamber *amicus* brief in No. 01-929, this Court should either (1) grant review in No. 01-929 and hold this case; or (2) grant review in both cases as well as in *McInnis* v. *Daniel*, No. 01-1290, and set all three cases down for argument.

Respectfully submitted.

JUSTS N. KARLSONS
DAVID M. RICE
MATTHEW J. KEMNER
Carroll, Burdick & McDonough LLP
44 Montgomery Street
Suite 400
San Francisco, CA 94104
(415) 989-5900

ALAN E. UNTEREINER*
ROY T. ENGLERT, JR.
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

APRIL 2002

**Counsel of Record*